UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
GLOBE BUILDING MATERIALS, INC.	)	CASE NO. 01-60182 JPK
	)	Chapter 7
Debtor.	)	
**********		
GORDON E. GOUVEIA, TRUSTEE,	)	
Plaintiff,	)	
v.	)	ADVERSARY NO. 02-6325
SIGGY'S SERVICE, INC.,	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO WITHDRAW ADMISSIONS

On December 20, 2002, Gordon E. Gouveia, as the Chapter 7 Trustee of Globe Building Materials, Inc. ("Trustee"), initiated this adversary proceeding by the filing of a complaint against Siggy's Service, Inc. ("Siggy's") which sought to recover alleged preferential transfers made by the debtor to Siggy's pursuant to 11 U.S.C. § 547. Siggy's timely filed an answer to the complaint on January 21, 2003.

During the ordinary course of discovery proceedings in this case, the Trustee served a discovery request entitled "Plaintiff's First Request for Admissions to Defendant" on counsel for Siggy's on June 17, 2003. Siggy's did not respond to these requests within the 30-day limitation period required by Rule 36(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by B.R. 7036.[1]

On December 22, 2003, the Trustee filed a motion for summary judgment, including supporting documentation and a memorandum, which is premised exclusively on facts established by Siggy's admission of facts resulting from its failure to timely respond to the Trustee's request for admissions. On January 26, 2004, Siggy's, by counsel, filed its

[1]Because the failure to timely respond is undisputed by the parties, the Court will not recite those portions of the record which establish that fact.

Defendant's Motion to Withdraw Admissions, and a response to the Trustee's motion for summary judgment to which is attached the "Unsworn Declaration of Mark A. Bates".[2]

The Trustee has appropriately responded to the Unsworn Declaration in his reply to Siggy's response to the Trustee's motion for summary judgment, but has not filed a separate response to the motion to withdraw admissions filed on January 26, 2004. Section III of the Trustee's reply memorandum filed on February 17, 2004 asserts in general terms that the Trustee "would suffer unfair prejudice if the Court allows the Defendant's Request to Withdraw". The Trustee asserts that the circumstances of this case are "precisely the type of dilatory conduct that Federal Rule of Civil Procedure 36 prohibits", and cites *United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987) as support for this proposition.

In the confusing manner in which the motion to withdraw admissions has been presented to the Court, it must also be noted that Siggy's has now responded to the Trustee's request for admissions: "Defendant's Response to Request for Admissions" has been placed of record by the Trustee, as Exhibit "A" attached to the Trustee's reply memorandum filed on February 17, 2004.

Although the record on the motion to withdraw admissions is not as clearly differentiated as the Court might desire, it is clear enough. The Court determines that the motion should be granted, and that the admissions established by the failure of Siggy's to timely respond to the Trustee's request for admissions will be set aside, and Siggy's tendered response to the request for admissions will be deemed to be the defendant's response to the Trustee's Rule 36 discovery request.

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[2]While this document should have been more appropriately attached to the motion to withdraw admissions, the Court will consider the declaration as part of the record to be considered on that motion. It should also be noted that the designation of the declaration as being "unsworn" is somewhat of a misnomer: the declaration complies with the provisions of 28 U.S.C. § 746 in the context that statements therein are deemed to be sworn to under an oath in accordance with that statute.

Legal Analysis

B.R. 7036 incorporates Rule 36 of the Federal Rules of Civil Procedure into the procedural rules applicable to adversary proceedings in bankruptcy cases. F.R.C.P. Rule 36(a) in pertinent part provides:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

Given Siggy's failure to timely respond to the Trustee's request for admissions, there is no question that the matters established by those requests have been admitted by Siggy's, absent a justifiable reason for setting aside the consequences of the failure to timely respond to those requests. As stated in Rule 36(b):

> Any matter admitted under this rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment which the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

The United States Court of Appeals for the Seventh Circuit has not issued a dispositive case on the elements/standards to be applied by a trial court to a motion to withdraw admissions made as a matter of law by failure to timely respond to requests for admissions in accordance with Rule 36(a). The case of *United States v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987) is not on point in the circumstances of this case: as stated in the opening recitation of facts in that case, "Kasuboski did not move to withdraw the admissions or timely resist the motion for summary judgment", 834 F.2d 1345, 1347. Siggy's has done both of the acts

omitted by Kasuboski in the foregoing case. Courts which have addressed the standard for review of a motion to withdraw facts deemed admitted by a failure to timely respond to a request for admissions have derived a relatively uniform standard of review. As stated in *In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001), that standard is:

> This Circuit has stressed that a deemed admission can only be withdrawn or amended by motion in accordance with Rule 36(b). *American Auto.*, 930 F.2d at 1120. In order to allow withdrawal of a deemed admission, Rule 36(b) requires that a trial court find that withdrawal or amendment: 1) would serve the presentation of the case on its merits, but 2) would not prejudice the party that obtained the admissions in its presentation of the case. *American Auto.*, 930 F.2d at 1119 (citations omitted); Fed.R.Civ.P. 36(b). Even when these two factors are established, a district court still has discretion to deny a request for leave to withdraw or amend an admission.

Closer to home, these standards were essentially adopted in *Moglia v. The Boat Warehouse*, 2003 WL 22835009 (Bankr. N.D.Ill. 2003), stated as follows:

> It is well established that a failure to respond to a request to admit will permit a court to enter summary judgment if the facts deemed admitted are dispositive. *Id.*; *Central States, Southeast and Southwest Areas Pension Fund v. GL & B Leasing Co., Inc.*, 874 F.Supp. 217, 218 n. 1 (N.D.Ill.1995); *Hartwig Poultry Inc. v. American Eagle Poultry (In re Hartwig Poultry, Inc.)*, 54 B.R. 37, 39 (Bankr.N.D.Ohio 1985). However, a court is not required to do so. Courts are particularly responsive to allowing late answers to requests for admission when summary judgment is involved. *White Consol. Indus., Inc. v. Waterhouse*, 158 F.R.D. 429 (D.Minn.1994).

As stated in *Ameribanc Savings Banks, F.S.B., et al. v. Resolution Trust Corporation, et al.*, 858 F.Supp. 576, 581 (E.D.Va. 1994):

> When a party seeks leave to file untimely answers, the test to be applied by the Court is whether permitting the party to answer will aid in the presentation of the merits of the action and whether prejudice will accrue to the propounding party. *Davis v. Noufal*, 142 F.R.D. 258 (D.D.C.1992) (holding plaintiff could withdraw admissions despite pending motion by defendants for summary judgment); *McClanahan v. Aetna Life Ins. Co.*, 144 F.R.D. 316, 320 (W.D.Va.1992); *Harrison Higgins Inc. v. AT & T Communications, Inc.*, 697 F.Supp. 220, 222 (E.D.Va.1988). The

> rule emphasizes the importance of having each action resolved on its merits, while at the same time assuring each party that its justified reliance upon admissions in preparation for trial will not operate to its prejudice. *Branch Banking & Trust Co.*, 120 F.R.D. at 658.

The grounds upon which Siggy's seeks to withdraw the effect of failure to timely respond to the Trustee's request for admissions are essentially personal ones relating to Siggy's counsel. The Unsworn Declaration of Mark A. Bates states that Attorney Bate's father was admitted to St. Anthony's Hospital on June 8, 2003 after suffering a stroke; that counsel's father remained in the hospital until he was transferred to a nursing home on July 1, 2003; that counsel was responsible for dealing with the healthcare practitioners and nursing home staff for his father's care and treatment; and that his father died on July 24, 2003. In this sequence of life-relationship definitive events, the Trustee's request for admissions was served on June 17, 2003. Attorney Bates acknowledges in his unsworn declaration that he neglected certain obligations of his practice during the period of his father's last illness and death – the Court deems email communications between the parties as to the effect of Attorney Bate's not responding timely to the request for admissions to be immaterial to whether or not Siggy's motion to withdraw should be granted.

As stated above, the sole response by the Trustee to the circumstances of untimely response to the request for admissions is Section III of the Trustee's reply memorandum filed on February 17, 2004. There are no facts stated in that response which establish any prejudice to the Trustee if Siggy's motion to withdraw is granted: in that event, this case would proceed as do all preference actions in this Division by the process of discovery on the merits. There is nothing in this record that establishes that any delay resulting from the procedural mechanics of dealing with Siggy's failure to timely respond to the Trustee's request for admissions will in any way affect the outcome of this case on the merits.

Perhaps some would respond to the terminal illness of a parent and his ultimate death in

a manner other than as Attorney Bates did. Perhaps some would be more diligent in balancing this life-defining event with the exigencies of his or her legal practice. However, I will not subjectively judge the impact of a parent's life-threatening illness on a person's ability – or even duty or obligation – to comply with the rules of federal civil practice at issue in this case. If some of us have not yet been in Attorney Bate's circumstances, at some time under the ordinary course of life events we will be.

The Court finds that allowing Siggy's to withdraw the effect of its failure to timely respond to the Trustee's request for admissions will subserve the presentation of the case on the merits, and will not prejudice the Trustee in his presentation of the case on the merits.

Based upon the foregoing analysis, the Court determines that the Defendant's Motion to Withdraw Admissions filed on January 26, 2004 will be granted, and that the defendant is relieved from the evidentiary effect of failure to timely respond to the Trustee's request for admissions provided by Rule 36(b) of the Federal Rules of Civil Procedure.

IT IS ORDERED that the Defendant's Motion to Withdraw Admissions filed on January 26, 2004 is GRANTED.

IT IS FURTHER ORDERED that, despite local rules or other rules providing otherwise, the defendant shall file its response to the Trustee's request for admissions of record as a separate filing within 20 days of the date of entry of this order.

Dated at Hammond, Indiana on March 12, 2004.

J. Philip Klingeberger

J. Philip Klingeberger, Judge
United States Bankruptcy Court

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